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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

No. 242

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING R. DECKER AND MARY JANE DECKER, PARTNERS t/a BERKELEY COMMUNITY BUILDERS,
Petitioner
against
GEORGE GILMER,
Respondent
and
E. V. ECHOLS, TRUSTEE IN BANKRUPTCY FOR ALBERT MAHANES COMPANY INCORPORATED, BANKRUPT,
Petitioner
against
GEORGE GILMER,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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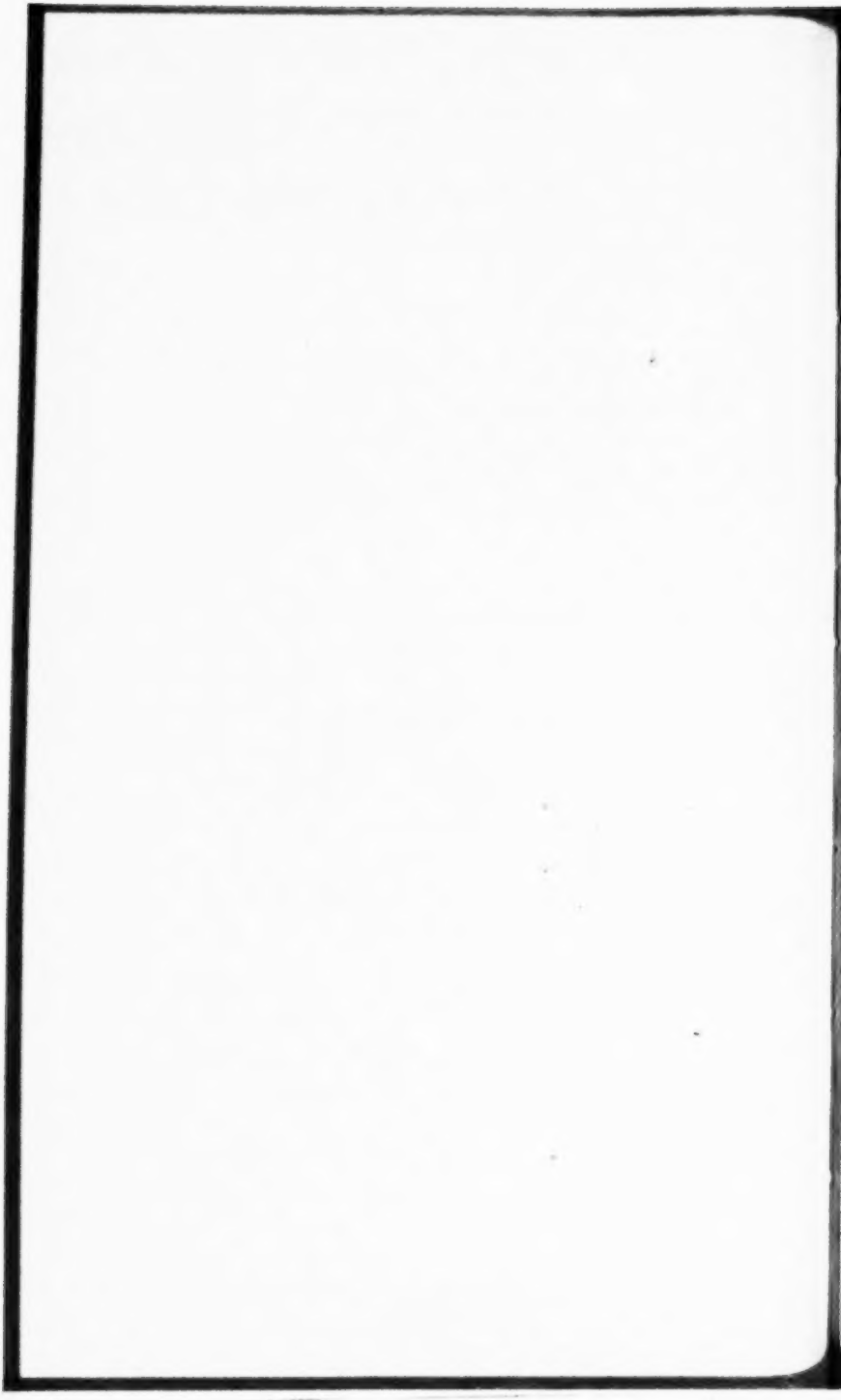

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To the Honorable Supreme Court of the United States:

Your Respondent answers the Petition for Writ of Certiorari and sets forth the following facts and grounds why the cause should not be reviewed by this Court.

SUPPLEMENTAL STATEMENT OF FACTS

Sterling R. Decker was adjudicated a bankrupt on January 12, 1962. On that date Albert Mahanes Company, Incorporated, which was 50% owned by Sterling R. Decker, was also adjudicated a bankrupt. Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders, were also adjudicated bankrupts on January 12, 1962. Individually Decker and his wife owned all but one share of Commonwealth Utilities, Incorporated, stock. Commonwealth Utilities, Incorporated, was not in bankruptcy.

George Gilmer had endorsed notes for Commonwealth Utilities, Incorporated, which, upon default, he had been required to pay on November 15, 1961. On January 31, 1962, he filed suit on the notes seeking to recover his loss. Before Gilmer's motion for judgment was answered, Sterling R. Decker claimed an account due to his partnership from Commonwealth Utilities, Incorporated, amounting to some $37,000.00, and another due to Albert Mahanes Company, Incorporated, amounting to some $22,000.00.

Decker had a few days earlier, in February, 1962, filed his Bankrupt schedules and listed Commonwealth Utili-

ties, Incorporated, as a creditor of Berkeley Community Builders, of which he was a partner.

Albert Mahanes Company, Incorporated, had also a few days earlier filed its schedules and listed no debt due from Commonwealth Utilities, Incorporated. Decker owned 50% of this corporation.

The Trustee for Deckers' partnership, Berkeley Community Builders, and the Trustee for his 50% owned Corporation, Albert Mahanes Company, Incorporated, at the suggestion of the Referee in Bankruptcy, asked Decker, who was President of Commonwealth Utilities, Incorporated, to confess judgment in the Circuit Court of Albemarle County, Virginia. Decker confessed such judgments on February 21, 1962 without receiving authority from any directors of the Corporation and without notice to George Gilmer, a stockholder and Director of the Corporation, or anyone else. He later answered Gilmer's suit against the Corporation seeking to set aside the confessed judgments, stating in part that the judgments were confessed on instructions of the Referee in Bankruptcy to preserve the Bankrupt estate. The Trustees were made parties to Gilmer's suit as parties in interest, but no judgments were sought against them. Trustee, B. B. Woodson, answered Gilmer's suit on orders of the Referee. Although Trustees sought out and used the forum of the State Court to obtain their judgments, they now deny that the same Court has jurisdiction to hear Gilmer's attack upon the judgments as being void. Gilmer, suing as a judgment creditor and as a stockholder on behalf of Commonwealth Utilities, Incorporated, denies any debt was owing to either Berkeley Community Builders or Albert Mahanes Company, Incorporated.

COURT PROCEEDINGS

The two suits have been argued separately and by different counsel in the Bankruptcy Court, at the same time but by different counsel in the United States District Court, and separately and by different counsel in the *United States Court of Appeals for the Fourth Circuit*. On each occasion the Courts have decided in favor of George Gilmer.

Counsel for B. B. Woodson, Trustee, conceded in his argument before the Circuit Court that this was a case where permission should properly be given, but insists Referee could not give permission voluntarily unless he was first asked, nor after institution of proceedings.

NO CONFLICT OF CIRCUIT COURT DECISIONS

Trustee has cited *In Re Garden City Parlor Furniture Co.*, 268 F. 318 as a case decided by the Court of Appeals for the Fifth Circuit in 1926, as being in direct conflict with the present case. This case was actually decided by the Seventh Circuit in 1920.

The *Garden City* case was not cited in any of the briefs submitted to the Court. The Fourth Circuit made no reference to the case. In the *Garden City* case, the Seventh Circuit decided books of accounts and receivables of the bankrupt estate were in possession of the Bankruptcy Courts' officers as against an assignee of the Bankrupt where the assignment was invalid. The Court's holding page 323, that "one may not take the law into his own hands and acquire possession by force or by a wrongful act and then invoke the aid of a Court of Equity to maintain him in that possession," however, seems to us to apply to Decker, who without authority

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confessed judgment against a corporation in favor of his own Trustees before the Clerk of the State Court, and then his Trustees seek the aid of the Bankruptcy Court to maintain them in their "possession" of fraudulently confessed judgments.

The confessed judgments never existed at the time of Bankruptcy. Gilmer's suit in the State Court is an attack on the judgments and seeks only to have the judgments declared void. It is in the nature of an appeal. The judgments were entered at the instigation of the Referee with no notice to Gilmer, and his suit is the only way in which he can obtain a review. The Referee has given his approval to Gilmer's action.

It is important to analyze the decision of the Court of Appeals for the Fourth Circuit. It ruled:

1. A State Court has jurisdiction of an action collaterally attacking its own earlier judgments. (Gilmer's suit is a direct attack.)

2. It has *in personam* jurisdiction of the parties.

3. The State Court's power is not dependent upon its possession of any tangible *res*.

4. The Bankruptcy Act prohibits the State Court from exercising its jurisdictional powers without approval.

The Court of Appeals thus settled the point of jurisdiction, not on whether the confessed judgments were or were not in possession of the Trustees, but by deciding that there was inherent jurisdiction in the State Court to decide an issue as to whether its Clerk erroneously entered a confessed judgment, and further deciding that the State Court may go ahead and exercise that jurisdiction with the approval of the Bankruptcy Court.

The Fourth Circuit affirms the Referee's order and the District Court's order that the Trustees' petition for

entry of an order enjoining and restraining Gilmer from proceeding with his suit in the Circuit Court of Albemarle County, Virginia, is denied.

The Trustees, page 8 of their brief (first full paragraph), state there is conflict between the ruling of the Fourth Circuit and the ruling in the case of *In Re Garden City Parlor Furniture Company* on the question of whether the confessed judgments constitute property in possession of the Court. In their argument, page 10 (first full paragraph), they admit that the Fourth Circuit did not rule directly on this point. How, then, can there be conflict between the Fourth Circuit ruling and that of the *Garden City* case?

Trustees, in their argument, pages 10, 11, cite cases which they feel are in conflict with the Fourth Circuit's decision. None of the Federal Court decisions as related in petitioners brief are in conflict, thus:

In Re Lustron Corp., 184 F. 2d 789, 794 (1950, 7th Circ.), *cert. den.* 340 U. S. 946, 71 S. Ct. 531, 95 L. Ed. 682, *at page* 794.

Holds that Bankruptcy Courts may enjoin suits impinging on its function of discovery of assets and equitable administration of the estate. This is precisely the holding of the Fourth Circuit.

Stanolind Oil & Gas Co. v. Logan, 92 F. 2d 28 (1937, 5th Circ.) *cert. den.* 302 U. S. 763, 58 S. Ct. 409, 82 L. Ed. 592; 303 U. S. 636, 58 S. Ct. 522, 82 L. Ed. 1097.

Holds that no other court has jurisdiction to "take over and administer it" without consent of the Bankruptcy Court. There is no conflict with the Fourth Circuit ruling.

Baker v. Gregory, 111 F. 2d 770 (1940, 5th Circ.)

Holds that Courts of Bankruptcy have "superior"

jurisdictions over State Courts. The Fourth circuit's ruling, "The exclusive jurisdiction of the bankruptcy Court to administer the bankrupt estate imposes implicit restrictions upon a state court's exercise of its jurisdictional power, but the limitations are not absolute for they are completely lifted by the Referee's approval, an approval he may not unreasonably withhold", is certainly in agreement.

Trustees' argument, pages 12, 13, is based upon their statement that "the Court of Appeals erred in holding that refusal of the referee to enjoin the State Court proceedings attacking an asset of the Bankrupt Estate constituted permission never requested". Trustees overlook the fact that the appellate court referred to the Referee's "approval" of the State Court's proceedings and that referee had said "Gilmer had a right to litigate the questions in State Court". Referee's order (Petitioner's Brief, page 24) states, "In the opinion of the Referee the administration of the bankruptcy proceeding will not be unreasonably interfered with by permitting Mr. Gilmer to proceed with the suit instituted by him in the Circuit Court of Albemarle County to test the validity of said confessed judgments". Referee's statement is unequivocal.

CONFLICT WITH STATE COURT DECISION

Trustees urge (page 11, their Brief) that the decisions of the Fourth Circuit is in conflict with *Palmer v. Larchmont Co.*, 284 N. Y. 288, 30 N. E. 2d 599 (1940), a State Court decision which held that without prior permission obtained by Trustee the State Court had no jurisdiction. This position has not since been adopted by the

Federal Courts. *Collier* (14th Ed.) Vol. 1, § 2.07 pages 165, 166, discusses the *Palmer* case and others and the requirement of prior permission of Trustee to sue and states "they go too far," adding that the Trustee may act on his own responsibility and bring suits in non-bankruptcy courts under his responsibility to collect and reduce to money the property of the estate, without the authority of the Referee, and adds,

> "but the mere lack of preliminary consent does not negate State Court jurisdiction."

citing *Bankers Trust Co. v. Palmer*, C. C. A. 2d, 1940, 109 F. 2d 136. Commenting on *Thompson v. Magnolia Petroleum Corporation*, 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876, Collier continues,

> "The Thompson case, *supra*, did not hold that special consent was necessary before a suit in a non-bankruptcy court could be brought by Trustee. It merely held that even in matters where the bankruptcy courts' summary jurisdiction may be properly invoked, the court must in some circumstances direct that the suit instead should be brought in a proper state court.
>
> "In any event a general inclusive consent should be amply sufficient and it need not be evidenced by a formal order. The view of the Palmer case exacts an unnecessarily meticulous standard in this respect."

CONCLUSION

We find no conflict in the Federal decisions or Justification for this Honorable Court's review of the case. The State Court has inherent jurisdiction to test the validity of a judgment confessed before its Clerk. The Referee

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had authority to permit Gilmer to proceed with his State Court action, and he did so. The fact that he did so in response to Trustees' objection is just as effective as if Gilmer himself had asked permission.

Trustees' petition should be denied.

Respectfully submitted,
GEORGE GILMER

Charlottesville, Virginia
July 23, 1964

Carl E. Hennrich

CARL E. HENNRICH
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Attorney for Respondent

CERTIFICATE

I, Carl E. Hennrich, do hereby certify that three (3) copies of the within Reply to Petition for Writ of Certiorari were delivered to the offices of Michael and Dent, 414 Park Street, Charlottesville, Virginia, and to the offices of Walker, Woodson and Aaron, 242 Court Square, Charlottesville, Virginia, Counsel for Petitioners, this 23 day of July, 1964.

Carl E. Hennrich

CARL E. HENNRICH
Attorney for Respondent